

STATE OF IOWA  
DEPARTMENT OF COMMERCE  
UTILITIES BOARD

IN RE:  RURAL IOWA INDEPENDENT TELEPHONE ASSOCIATION	DOCKET NO. DRU-04-1
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**ORDER DECLINING TO ISSUE DECLARATORY ORDER**

(Issued July 22, 2004)

**PROCEDURAL BACKGROUND**

On May 24, 2004, the Rural Iowa Independent Telephone Association (RIITA) filed with the Utilities Board (Board) a petition for a declaratory order regarding the Board's orders in *Exchange of Transit Traffic*, Docket No. SPU-00-7 (DRU-00-2). RIITA's questions concern the interpretation of three Board orders issued in that docket with regard to payments and reimbursement of intercarrier fees. The Board's "Proposed Decision and Order" was issued November 26, 2001 (Proposed Decision), an "Order Affirming Proposed Decision and Order" was issued March 18, 2002 (Decision), and an "Order Denying Application for Rehearing" was issued May 3, 2002. RIITA states that its current petition results from an interpretation of these Board orders adopted by Qwest Corporation (Qwest) regarding payments made for traffic after April 1999 and Qwest's resulting demands for refunds of alleged overpayments. RIITA states that in Docket No. SPU-00-7, Qwest did not ask the Board for reimbursement of any over-payments made after April 1999.

In its petition, RIITA alleges that Qwest is engaging in self-help by withholding payment from bills submitted to Qwest by the Independent Telephone Companies (ITCs). According to RIITA, Qwest is withholding these payments in order to recover monies it paid for charges related to alleged wireless traffic transported after April 1999.

In its Petition, RIITA asks the Board to issue a declaratory order stating:

1. That the referenced orders do not give Qwest legal authority to be paid for alleged wireless transit traffic delivered to ITCs since April 1999 for which it [Qwest] has already paid.
2. That Qwest's self-help collection efforts are unlawful and should be discontinued for claimed payments over transit traffic delivered between April 1999 and present.
3. That Qwest should return payments it has received for this traffic including payments withheld and payments it coerced the ITCs to pay.
4. That Qwest should discontinue all future self-help assistance efforts with respect to any inter-company compensation issues and pursue action before this Board or in other proper forums instead.
5. Grant such other and further relief that may be proper.

On June 7, 2004, Qwest petitioned to intervene in this proceeding. Qwest states in support of its intervention that it is, and has been, a central and important party throughout the entire controversy and remains so in the instant new proceeding. Qwest points out that in each of the issues laid out by RIITA, Qwest is specifically mentioned and that RIITA seeks Board guidance as to Qwest's conduct. Qwest states that its interests are clearly at odds with RIITA and are unique to Qwest. Qwest states that while it has supported the Board's order in the appellate courts, the interests of the Board and Qwest are different in that Qwest has millions

of dollars at issue in this overall controversy. Qwest states it intends to participate fully in this proceeding. Qwest agrees to be bound by the determinations reached herein, reserving its right to appeal.

Qwest disputes that any "interpretation" of the Board's order is required or appropriate and denies that RIITA's petition is timely. Qwest also disputes that the Board has jurisdiction over matters raised by the RIITA petition, noting that RIITA is the plaintiff and the Board is the defendant in a matter before the federal district court involving the same issues for which RIITA herein seeks interpretation.

In its petition to intervene, Qwest put forward its position to each of the issues RIITA listed in its request for declaratory order as follows:

1. The Board's orders give Qwest authority to be paid. In the "Proposed Decision and Order" in Docket No. SPU-00-7, Finding of Fact 10 states that "INS and the independent telephone companies are not entitled to CEA and access charges from Qwest for CMRS traffic from April, 1999 to the present." Qwest states that the Board was aware that Qwest had made payments to independent companies after April 1999.

2. RIITA's claim that Qwest is engaging in unlawful "self-help" collection efforts over claimed payments for transit traffic delivered between April 1999 to present is an attempt by RIITA to avoid such payments.

3. The request to return payment is RIITA's attempt to reverse the Board's decision in Docket No. SPU-00-7.

4. RIITA's request that the Board direct Qwest to discontinue all future "self-help" assistance efforts with respect to any inter-company compensation issues and pursue action before this Board or in other proper forums instead would presumably prohibit Qwest from engaging in normal business-to-business activity. Qwest states its belief that such a declaration would be instantly the subject of immediate judicial requests to enjoin its effectiveness. Qwest opined that the Board would not entertain such a consideration and further has no authority to make such an order.

5. No grant of further relief to RIITA is proper. Qwest states that for more than five years it sought to stop RIITA's members from billing Qwest for

access on calls not originated by Qwest subscribers. Further, RIITA has urged its members to ignore the Board's orders. RIITA has sought delay and obfuscation at every opportunity, including this most recent filing.

After reviewing the petition for declaratory order filed by RIITA and the request for intervention filed by Qwest, the Board found the record unclear regarding the specific issues raised in this petition and whether they were the same issues presented in pending litigation in federal district court. Therefore, the Board directed both parties to this proceeding to respond to the following question:

Are the issues raised in the petition for declaratory order filed by the Rural Iowa Independent Telephone Association (RIITA) different from the issues currently before the Federal District Court in Case No. 4:02-CV-90348? Please explain in detail how the issues are either the same or different from those being litigated in Federal District Court.

On June 30, 2004, RIITA and Qwest responded to the Board's question. RIITA stated that the issue raised in the federal case is whether the Board misinterpreted the 1996 Telecommunications Act and the resulting Federal Communications Commission (FCC) orders and rules.<sup>1</sup> RIITA claims that the Board did not address the issue of whether payments made to ITCs after April 1999 but prior to the Board's rulings were subject to reimbursement, interest, or penalties.<sup>2</sup>

Qwest asserts that the issues raised in the petition for declaratory ruling are exactly the same issues currently before the Federal District Court.<sup>3</sup> However, Qwest elaborates as follows:

Thus, the remand simply directs the district court to decide the merits of RIITA's claims that the Board's interpretation

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<sup>1</sup> RIITA Response to Board Question, June 30, 2004, pp. 1-2.

<sup>2</sup> Id. at p. 3.

<sup>3</sup> Qwest Response to Board Question, June 30, 2004, p. 1.

and application of federal law was erroneous. In doing so, the district court will examine the Act, the FCC's rules, and FCC decision and orders explaining and applying the rules to determine whether the Board properly interpreted and applied the relevant statutory provisions and rules. Ultimately, the court will decide whether the Board correctly held that RIITA's members were not entitled to impose tariffed or other "access" charges on the intraMTA wireless traffic at issue.<sup>4</sup>

A declaratory order pursuant to Iowa Code § 17A.9 (2003) is issued when a person requests the Board to determine the applicability of a statute, rule, or order to a specified set of circumstances. The main issue in RIITA's current petition appears to be interpretation of the Board's orders concerning reimbursement to Qwest of fees it paid after it gave notice in April 1999 that Qwest no longer believed the traffic in question was subject to the ITCs' access tariffs. This is a different issue than the issues presented in Federal District Court.

The Board has reviewed its three orders issued in Docket No. SPU-00-7 referred to by RIITA in its petition. Additionally, the Board has reviewed the record in Docket No. SPU-00-7.

Both Qwest and RIITA refer to payments made by Qwest to ITCs from April 1999 forward. However, it appears that the evidence before the Board in Docket No. SPU-00-7 did not indicate that there were any payments made by Qwest between April 1999 and September 1999.

In testimony before the Board, ITA witness Bernard Snoddy stated:

Until April 1999, Qwest paid the ILECs, which are the same exchange carriers likely to concur in the ITA Tariff No. 2, for traffic terminating to ILEC end offices as if this traffic were

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<sup>4</sup> Id. at pp. 2-3.

Qwest's terminating toll traffic. . . . After April 1999, Qwest began adjusting CABS bills submitted to Qwest by the ILECs.<sup>5</sup>

This would appear to lead to the conclusion that Qwest stopped paying the disputed fees after April of 1999. Further, in rebuttal testimony, Qwest witness Donald W.

Andersen stated:

Qwest is asking the Board to order INS to refund the CEA charges that were collected by INS from Qwest in error from April 12, 1997 through April 11, 1999. This amounts to \$390,041.00.<sup>6</sup>

No mention was made of any payments made after April 11, 1999. Thus, the Board in its Proposed Decision noted "Qwest started adjusting its payments in September of 1999, for the period reaching back to April 1999."<sup>7</sup>

It appears from reviewing this testimony and the language of the Board's Proposed Decision that the record, as presented to the Board, did not indicate that any payments were made by Qwest after April 1999 that were relevant to the dispute. Rather, the record supports the conclusion that instead of making payments after that date, Qwest was making adjustments to bills. Therefore, the Board did not, nor will it now, address the issue of what treatment might be appropriate for disputed payments made after April 1999.

Pursuant to Iowa Code § 17A.9(5)(d) and 199 IAC 4.9(1), the Board may decline to issue a declaratory order on some or all of the questions raised.

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<sup>5</sup> Prepared Direct Testimony of Bernard Snoddy, December 11, 2000, p. 12.

<sup>6</sup> Prepared Rebuttal Testimony of Donald W. Andersen, January 24, 2001, p. 2.

<sup>7</sup> *In re: Exchange of Transit Traffic*, Docket No. SPU-00-7, Proposed Decision and Order, p. 37 (Issued November 26, 2001).

Specifically, the Board may refuse when the questions presented by the petition are "unclear, overbroad, insufficient, or otherwise inappropriate as a basis upon which to issue an order."<sup>8</sup> The issue upon which RIITA seeks clarification was not ruled upon by the Board in its orders in Docket No. SPU-00-7, as the evidence did not present the issue for the Board's determination. It would be inappropriate for the Board to interpret its prior orders as if they addressed issues that were not presented.

**IT IS THEREFORE ORDERED:**

The Board declines to issue a declaratory order as requested by the Rural Iowa Independent Telephone Association in its petition for declaratory order filed May 24, 2004, for the reasons stated in the body of this order.

**UTILITIES BOARD**

/s/ Diane Munns

/s/ Mark O. Lambert

ATTEST:

/s/ Judi K. Cooper  
Executive Secretary

/s/ Elliott Smith

Dated at Des Moines, Iowa, this 22<sup>nd</sup> day of July, 2004.

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<sup>8</sup> 199 IAC 4.9(1)"6."